

1
2
3
4
5
6
7
8
9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA-EASTERN DIVISION
11

12 DANIEL FELIX,) Case No. ED CV 16-00173-AS
13 Plaintiff,)
14) MEMORANDUM OPINION AND
15 v.) ORDER OF REMAND
16)
17 NANCY A. BERRYHILL,¹ Acting)
18 Commissioner of Social)
Security,)
Defendant.)
_____)

19
20 PROCEEDINGS
21

22 On January 29, 2016, Plaintiff filed a Complaint seeking review of
23 the denial of his application for Supplemental Security Income. (Docket
24 Entry No. 1). The parties have consented to proceed before the
25 undersigned United States Magistrate Judge. (Docket Entry Nos. 11-12).
26 On June 15, 2016, Defendant filed an Answer along with the
27 _____

28 ¹ Nancy A. Berryhill is now the Acting Commissioner of the
Social Security Administration and is substituted in for Acting
Commissioner Caroyln W. Colvin in this case. See 42 U.S.C. § 205(g).

1 Administrative Record ("AR"). (Docket Entry Nos. 14-15). The parties
2 filed a Joint Stipulation ("Joint Stip.") on September 6, 2017, setting
3 forth their respective positions regarding Plaintiff's sole claim.
4 (Docket Entry No. 34).
5

6
7 The Court has taken this matter under submission without oral
8 argument. See C.D. Cal. L.R. 7-15; "Order Re: Procedures in Social
9 Security Case," filed February 1, 2016 (Docket Entry No. 9).
10

11
12 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**
13

14 On June 28, 2012, Plaintiff filed an application for Supplemental
15 Security Income, alleging a disability since October 1, 1999. (AR 158-
16 78).
17

18 On March 26, 2014, the Administrative Law Judge ("ALJ"), James
19 Nguyen, heard testimony from Plaintiff (who was represented by counsel)
20 and vocational expert Sandra Fioretti. (See AR 37-62). On July 3, 2014,
21 the ALJ issued a decision denying Plaintiff's application. (See AR 23-
22 31). After determining that Plaintiff had severe impairments --
23 "chronic kidney disease, degenerative joint disease in the right hip,
24 lumbar spine degeneration, tendinitis in the right knee, hypertension,
25 diabetes mellitus, dyslipidemia, hepatitis C, and adjustment disorder
26
27
28

1 with anxiety (AR 25)² -- but did not have an impairment or combination
2 of impairments that met or medically equaled the severity of one of the
3 Listed Impairments (AR 25-26), the ALJ found that Plaintiff had the
4 residual functional capacity ("RFC")³ to perform light work⁴ with the
5 following limitations: can stand/walk 4 hours during an 8-hour workday;
6 can occasionally climb ramps and stairs, but can never climb ladders,
7 ropes and scaffolds; can occasionally balance, stoop, kneel, crouch and
8 crawl; should avoid concentrated exposure to vibration and should avoid
9 working around unprotected heights; requires use of a cane for
10 ambulation if walking more than 250 feet away from the workstation; can
11 understand, remember and carry out simple job instructions, can maintain
12 attention and concentration to perform simple, routine and repetitive
13 tasks; can have frequent interaction with coworkers, supervisors, and the
14 general public; and can work in an environment with occasional changes
15 to the work setting and with occasional work-related decision making.
16 (AR 26-30). The ALJ then determined that Plaintiff did not have any
17 past relevant work (AR 30), but that jobs existed in significant numbers
18 in the national economy that Plaintiff can perform, and therefore found
19 that Plaintiff was not disabled within the meaning of the Social
20 Security Act. (AR 30-31).

24
25 ² The ALJ found that Plaintiff's history of polysubstance abuse
was a nonsevere impairment. (AR 25).

26 ³ A Residual Functional Capacity is what a claimant can still do
27 despite existing exertional and nonexertional limitations. See 20
C.F.R. § 416.945(a)(1).

28 ⁴ "Light work involves lifting no more than 20 pounds at a time
with frequent lifting or carrying of objects weighing up to 10 pounds."
20 C.F.R. § 416.967(c).

1 Plaintiff requested that the Appeals Council review the ALJ's
2 decision. (See AR 18). The request was denied on December 9, 2015.
3 (See AR 1-6). The ALJ's decision then became the final decision of the
4 Commissioner, allowing this Court to review the decision. See 42 U.S.C.
5 §§ 405(g), 1383(c).
6

7 8 **PLAINTIFF'S CONTENTIONS**

9
10 Plaintiff solely alleges that the ALJ failed to properly assess
11 Plaintiff's credibility. (See Joint Stip. at 5-16, 26).
12

13 14 **DISCUSSION**

15
16 After consideration of the record as a whole, the Court finds that
17 Plaintiff's claim of error warrants a remand for further consideration.
18

19 **A. The ALJ Did Not Properly Assess Plaintiff's Credibility**

20
21
22 Plaintiff asserts that the ALJ did not provide clear and convincing
23 reasons for finding that Plaintiff's testimony about his symptoms was
24 not credible. (See Joint Stip. at 5-16, 26). Defendant asserts that
25 the ALJ provided valid reasons for finding Plaintiff not fully credible.
26 (See Joint Stip. at 16-26).
27
28

1 Plaintiff made the following statements in a "Function Report -
2 Adult" dated August 19, 2012 (see AR 198-205):
3

4 He lives with family in an apartment. He does not take
5 care of pets. With respect to his daily activities, he wakes
6 up, prays for a good day, checks on his mother who has
7 Alzheimer's, takes his medication, eats breakfast, watches
8 television until noon, feeds his mother, tries to rest,
9 watches televsion, eats dinner, and then goes to bed. (See AR
10 198-99).
11

12
13 As a result of his impairments, he no longer is able to
14 work, enjoy himself, and be around other people. His
15 impairments affect his sleep (he cannot sleep well at night).
16 His impairments affect his abilities to use the toilet (he is
17 always constipated). He needs special reminders (post-it
18 notes) to take care of personal needs and grooming, and he
19 needs reminders (a pill box) to take medicine. (See AR 200).
20
21

22 He prepares his own meals (i.e., sandwiches and frozen
23 dinners) on a daily and sometimes weekly basis (which takes
24 him 30 minutes to 2 hours). His impairments have changed his
25 cooking habits, since he does not feel well and has problems
26 concentrating. His household chores are cleaning and laundry
27 which takes him 2 hours every 2 weeks. He needs someone to
28

1 help him do his household chores. He goes outside alone five
2 times a day; he either drives or rides in a car. He shops in
3 stores for food, two times a month (3 hours). He is able to
4 pay bills. (See AR 200-02).
5

6
7 His hobbies and interests are watching television and
8 working. He no longer works because he cannot stand on his
9 leg for an extended period of time. He does not spend time
10 with others. He regularly goes to church on Sundays. He has
11 problems getting along with others (talking to people) because
12 he has a short temper and others get on his nerves. (See AR
13 202-03).
14

15
16 His impairments affect his lifting, squatting, bending,
17 standing, reaching, walking, kneeling, talking, seeing,
18 completing tasks and getting along with others. He can lift
19 50 pounds. He can walk for 30 to 60 minutes before he has to
20 rest, and then must rest for 2 hours before he can resume
21 walking. He does not know for how long he can pay attention,
22 whether he finishes what he starts, how well he follows
23 instructions (he tries to follow spoken instructions), or how
24 well he gets along with authority figures. He has never been
25 fired or laid off from a job because of problems getting along
26 with other people. He handles stress "the best [he] can", and
27 does not handle changes in routine well. He has unusual
28

1 behaviors/fears, specifically, he panics and is afraid to talk
2 to people. Most of the time he uses a cane which was
3 prescribed in 2006. (See AR 203-04).
4

5
6 Plaintiff testified at the March 26, 2014 administrative hearing as
7 follows (see AR 39-57):
8

9 He completed tenth grade; he did not get a GED (he went
10 to trade school). He lives with his younger son who is 19
11 years old and is looking for work and going to start college.
12 He last worked in 1999. He has a dog who stays inside with
13 him (he does not walk the dog). He cannot work a full-time
14 job (even with alternate sitting and standing) because of the
15 chronic pain in his hip, knee and calves. Even though he can
16 alternate sitting and standing for 3 or 4 hours, he would be
17 in great pain if he worked a job (i.e., packing boxes) for
18 just 3 to 4 hours. He is in pain if he walks or stands for
19 about 10 minutes. His chronic anxiety makes him afraid to go
20 outside sometimes and makes him nervous, stressed out, and not
21 wanting to be around people on a daily basis. (See AR 39-41,
22 47-49, 52-57).
23
24

25
26 For his right hip (one ball joint is big, and causes
27 "constipation like type pain"), he has received chiropractic
28 treatment and pain medication (gabepentine and 30 mg

1 methadone). The pain medication helps, but "not all the way"
2 (he always is hurting). He wants to stop taking methadone
3 because it makes him feel tired. His chiropractor wrote that
4 he might need a total hip replacement, but he has not yet seen
5 an orthopedic surgeon because of problems with his insurance.
6 For his knee (one leg is bigger than the other), he has
7 received chiropractic treatment. For his back, he has
8 received chiropractic treatment and nerve stimulation. He has
9 never received any injections for his back. For his diabetes,
10 he takes insulin in the morning and at night, which helps
11 control his blood sugar levels. He takes three medications
12 for his high blood pressure. Although he was offered
13 medication (Interferon) for his hepatitis, he refused it
14 because he was already on so many medications that did not
15 make him feel well. He has seen a psychiatrist three times
16 for chronic anxiety and depression. For anxiety he takes
17 Xanax (he has taken Xanax for one or two years), which does
18 not really help, and the doctor does not want him to take it
19 because of its addictive nature. One doctor thought he had
20 prostate cancer, but it was only a prostate infection which he
21 had for three months. (See AR 42-51).
22
23
24
25

26 He has a history of using cocaine and heroin, and he used
27 methamphetamine for a short period. He currently is in a
28 methadone program for his heroin addiction (he has been in the

1 program for about 1 1/2 years), and he was in a methadone
2 program about 7 years ago. (See AR 41-42, 48, 50-51).
3

4 When asked about what things he does around the house, he
5 testified he usually spends most of the time in bed watching
6 television because of his hip pain. He goes to the kitchen,
7 makes a sandwich, returns to his room, eats the sandwich, and
8 lies down again. His son does most of the housework. He
9 spends most of the day lying down on his left side with his
10 leg on a pillow, which takes the weight off his right side.
11 When he sits in a chair, he leans on his left side and lifts
12 his right side up off the chair (preventing the free use of
13 both his hands), which takes the weight off his right side.
14 He needs to use a cane if he walks a "long distance" (around
15 10 minutes). He is able to walk about 250 feet (from the
16 parking lot to the location of the administrative hearing)
17 without the use of his cane. He is able to go to the store,
18 but it causes him anxiety. (See AR 40-41, 52-54, 56).
19
20
21

22 After discussing Plaintiff's testimony (see AR 27), the ALJ
23 addressed Plaintiff's credibility as follows:
24
25

26 After careful consideration of the evidence, the
27 undersigned finds that the claimant's medically determinable
28 impairments could reasonably be expected to cause the alleged

1 symptoms; however, the claimant's statements concerning the
2 intensity, persistence and limiting effects of these symptoms
3 are not entirely credible for the reasons explained in this
4 decision. (AR 28).

5
6 After discussing the medical evidence, including records from
7 Desert Valley Hospital, Dr. Mikes Victorville Clinic, McKee Family
8 Health Clinic, Life Chiropractic Center, a consultative examiner's
9 report, and a psychiatric consultative examiner's report (see AR 28-30),
10 the ALJ stated:
11

12
13 The medical record, as highlighted above, casts doubt on
14 the credibility of the claimant's allegations of disability.
15 More specifically, the claimant has not sought the type of
16 treatment one would expect of a totally disabled individual.
17 In fact, the available medical record is remarkably sparse, and
18 what few treatment records are available consist of little more
19 than medication monitoring appointments. (AR 29).
20

21
22 A claimant initially must produce objective medical evidence
23 establishing a medical impairment reasonably likely to be the cause of
24 the subjective symptoms. Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir.
25 1996); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991). Once a
26 claimant produces objective medical evidence of an underlying impairment
27 that could reasonably be expected to produce the pain or other symptoms
28

1 alleged, and there is no evidence of malingering, the ALJ may reject the
2 claimant's testimony regarding the severity of his or her pain and
3 symptoms only by articulating specific, clear and convincing reasons for
4 doing so. Brown-Hunter v. Colvin, 798 F.3d 749, 755 (9th Cir.
5 2015)(citing Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir.
6 2007)); see also Smolen, *supra*; Reddick v. Chater, 157 F.3d 715, 722
7 (9th Cir. 1998); Light v. Social Sec. Admin., 119 F.3d 789, 792 (9th
8 Cir. 1997). Because the ALJ does not cite to any evidence in the record
9 of malingering, the "clear and convincing" standard stated above
10 applies.
11

12
13 Here, the ALJ failed to provide clear and convincing reasons for
14 finding that Plaintiff's testimony about the intensity, persistence and
15 limiting effects of his symptoms was not entirely credible.⁵
16

17
18 First, the ALJ failed to "specifically identify 'what testimony is
19 not credible and what evidence undermines [Plaintiff's] complaints.'" Parra v. Astrue, 481 F.3d 742, 750 (9th Cir. 2007) (quoting Lester v.
20
21

22 ⁵ The Court will not consider reasons for finding Plaintiff not
23 entirely credible (see Joint Stip. at 17-23, i.e., level or frequency of
24 treatment, lack of treatment, routine and conservative medical
25 treatment, Plaintiff's reported improvement with treatment, Plaintiff's
26 inability to work for reasons other than a medical impairment, specific
27 objective medical evidence [including medical opinions] undermining
28 Plaintiff's complaints, Plaintiff's daily activities) that were not
given by the ALJ in the Decision. See Connett v. Barnhart, 340 F.3d
871, 874 (9th Cir. 2003) ("We are constrained to review the reasons the
ALJ asserts."; citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947),
Pinto v. Massanari, 249 F.3d 840, 847-48 (9th Cir. 2001)); and Garrison
v. Colvin, 759 F.3d 995, 1010 (9th Cir. 2014) ("We review only the
reasons provided by the ALJ in the disability determination and may not
affirm the ALJ on a ground upon which he did not rely.").

1 Chater, 81 F.3d 821, 834 (9th Cir. 1995)); see also Smolen, 80 F.3d at
2 1284 ("The ALJ must state specifically what symptom testimony is not
3 credible and what facts in the record lead to that conclusion").
4

5
6 Second, the ALJ's determination that Plaintiff's testimony was not
7 fully supported by the medical evidence was an insufficient reason for
8 finding Plaintiff less than fully credible with respect to his testimony
9 about the severity of his physical and mental impairments. Once a
10 claimant demonstrates medical evidence of an underlying impairment, "an
11 ALJ 'may not disregard [a claimant's testimony] solely because it is not
12 substantiated affirmatively by objective medical evidence.'" Trevizo v.
13 Berryhill, 862 F.3d 987, 1001 (9th Cir. 2017)(quoting Robbins v. Soc.
14 Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006)).
15
16

17 Third, the ALJ's partial discrediting of Plaintiff's testimony
18 because Plaintiff "has not sought the type of treatment one would expect
19 of a totally disabled individual" was improper, because the ALJ did not
20 ask Plaintiff why he did not seek different or more medical treatment.
21 See Social Security Ruling 96-7p (" . . . [I]f the frequency or extent of
22 the treatment sought by an individual is not comparable with the degree
23 of the individual's subjective complaints, or if the individual fails to
24 follow prescribed treatment that might improve symptoms, we may find the
25 alleged intensity and persistence of an individual's symptoms are
26 inconsistent with the overall evidence of record. We will not find an
27 individual's symptoms inconsistent with the evidence in the record on
28

1 this basis without considering possible reasons he or she may not comply
2 with treatment or seek treatment consistent with the degree of his or
3 her complaints. We may need to contact the individual regarding the
4 lack of treatment or, at an administrative proceeding, ask why he or she
5 has not complied with or sought treatment in a manner consistent with
6 his or her complaints."). Plaintiff's failure to seek more medical
7 treatment may have been the result of his financial issues (see AR 49
8 [At the hearing, Plaintiff testified he had issues with his insurance]).
9 See Smolen, supra ("Where a claimant provides evidence of a good reason
10 for not taking medication for her symptoms [such as Plaintiff's
11 testimony that "she had not sought treatment (and therefore was not
12 taking medication) for her chronic fatigue and pain because, as a result
13 of not being able to maintain a job, she had no insurance and could not
14 afford treatment"], her symptom testimony cannot be rejected for not
15 doing so."); see also Regennitter v. Commissioner of Soc. Sec. Admin.,
16 166 F.3d 1294, 1297 (9th Cir. 1998)(". . . [W]e have proscribed the
17 rejection of a claimant's complaints for lack of treatment when the
18 record establishes that the claimant could not afford it[.]"); Gamble v.
19 Chater, 68 F.3d 319, 322 (9th Cir. 1995)("It flies in the face of the
20 patent purposes of the Social Security Act to deny benefits to someone
21 because he is too poor to obtain medical treatment that may help
22 him.")(quoting Gordon v. Schweiker, 725 F.2d 231, 237 (4th Cir. 1984)).
23
24
25
26

27 Fourth, to the extent the ALJ partially discredited Plaintiff's
28 testimony based on the conservative nature of his treatments, the ALJ's

1 reason was not clear and convincing. Evidence of conservative treatment
2 may be considered in a credibility determination. Parra v. Astrue, 481
3 F.3d 742, 750-51 (9th Cir. 2007) ("[E]vidence of 'conservative
4 treatment' is sufficient to discount a claimant's testimony regarding
5 severity of an impairment[.]"). However, the ALJ has failed to show
6 that Plaintiff only obtained a conservative course of treatment for his
7 impairments. See Childress v. Colvin, 2014 WL 4629593, *12 (N.D. Cal.
8 Sept. 16, 2014) ("There is no guiding authority on what exactly
9 constitutes 'conservative' or 'routine' treatment."); Boitnott v.
10 Colvin, 2016 WL 362348, *4 (S.D. Cal. January 29, 2016) (explaining that
11 "[t]here was no medical testimony at the hearing or documentation in the
12 medical record that the prescribed medication constituted 'conservative'
13 treatment of [the plaintiff's] conditions," and that the ALJ "was not
14 qualified to draw his own inference regarding whether more aggressive
15 courses of treatments were available for Plaintiff's conditions"). At
16 the hearing, the ALJ did not ask Plaintiff why the treatments for his
17 impairments were conservative, or why he had not obtained other kinds of
18 treatments for his impairments.
19
20
21

22 Fifth, to the extent that the ALJ relied on the sparseness of the
23 medical record to partially discredit Plaintiff's testimony, the ALJ's
24 reason was not clear and convincing. The ALJ failed to state how a
25 sparse medical record rendered Plaintiff's testimony about his pain and
26 symptoms less than fully credible. See Moisa v. Barnhart, 367 F.3d 882,
27 884 (9th Cir. 2004)(. . . [T]he ALJ . . . made no findings that would
28

1 allow us to conclude that he rejected the testimony on permissible
2 grounds, such as reputation for dishonesty, conflicts between the
3 claimant's testimony, or internal contradictions in the testimony.").
4

5 **B. Remand Is Warranted**

6

7
8 The decision whether to remand for further proceedings or order an
9 immediate award of benefits is within the district court's discretion.
10 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
11 useful purpose would be served by further administrative proceedings, or
12 where the record has been fully developed, it is appropriate to exercise
13 this discretion to direct an immediate award of benefits. Id. at 1179
14 ("[T]he decision of whether to remand for further proceedings turns upon
15 the likely utility of such proceedings."). However, where, as here, the
16 circumstances of the case suggest that further administrative review
17 could remedy the Commissioner's errors, remand is appropriate. McLeod
18 v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); Harman v. Apfel, supra,
19 211 F.3d at 1179-81.
20

21
22 Since the ALJ failed to properly assess Plaintiff's credibility,
23 remand is appropriate. Because outstanding issues must be resolved
24 before a determination of disability can be made, and "when the record
25 as a whole creates serious doubt as to whether the [Plaintiff] is, in
26 fact, disabled within the meaning of the Social Security Act," further
27 administrative proceedings would serve a useful purpose and remedy
28

defects. Burrell v. Colvin, 775 F.3d 1133, 1141 (9th Cir. 2014)(citations omitted).

ORDER

For the foregoing reasons, the decision of the Commissioner is reversed, and the matter is remanded for further proceedings pursuant to Sentence 4 of 42 U.S.C. § 405(g).

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: October 10, 2017

/s/

ALKA SAGAR
UNITED STATES MAGISTRATE JUDGE